



KEN PAXTON
ATTORNEY GENERAL OF TEXAS

July 27, 2017

Ms. Ann-Marie Sheely
Assistant County Attorney
Travis County Attorney's Office
P.O. Box 1748
Austin, Texas 78767

OR2017-16942

Dear Ms. Sheely:

You ask whether certain information is subject to required public disclosure under the Public Information Act (the "Act"), chapter 552 of the Government Code. Your request was assigned ID# 668195.

The Travis County District Attorney's Office (the "district attorney's office") received a request for information pertaining to specified charges involving the requestor's client.¹ You state you released some information to the requestor. You claim the submitted information is excepted from disclosure under sections 552.101 and 552.108 of the Government Code. We have considered the exceptions you claim and reviewed the submitted representative sample of information.²

¹We note you sent the requestor an estimate of charges pursuant to section 552.2615 of the Government Code. *See* Gov't Code § 552.2615. The estimate of charges required the requestor to provide a deposit for payment of anticipated costs under section 552.263 of the Government Code. *See id.* § 552.263(a). You inform us the district attorney's office received the required deposit on May 8, 2017. *See id.* § 552.263(e) (if governmental body requires deposit or bond for anticipated costs pursuant to section 552.263, request for information is considered to have been received on date governmental body receives bond or deposit).

²We assume that the "representative sample" of records submitted to this office is truly representative of the requested records as a whole. *See* Open Records Decision Nos. 499 (1988), 497 (1988). This open records letter does not reach, and therefore does not authorize the withholding of, any other requested records to the extent that those records contain substantially different types of information than that submitted to this office.

Section 552.101 of the Government Code excepts from disclosure “information considered to be confidential by law, either constitutional, statutory, or by judicial decision.” Gov’t Code. § 552.101. This section encompasses article 42A.256 of the Code of Criminal Procedure. Article 42A.256 is applicable to presentence investigation and postsentence reports and provides, in part:

(a) The judge by order may direct that any information and records that are not privileged and that are relevant to a presentence or postsentence report be released to a supervision officer conducting a presentence investigation under [subchapter F of Chapter 42A of the Code of Criminal Procedure] or preparing a postsentence report under Article 42A.259. The judge may also issue a subpoena to obtain that information.

(b) A presentence or postsentence report and all information obtained in connection with a presentence investigation or postsentence investigation report are confidential and may be released only as:

(1) provided by:

(A) Subsection (c);

(B) Article 42A.255;

(C) Article 42A.257;

(D) Article 42A.259; or

(E) Section 614.017, Health and Safety Code; or

(2) directed by the judge for the effective supervision of the defendant.

Crim. Proc. Code art. 42A.256(a), (b). You assert the information you have marked consists of a presentence investigation report. Additionally, you assert none of the release provisions in article 42A.256 are applicable. Accordingly, we conclude the district attorney’s office must withhold the information you have marked under section 552.101 of the Government Code in conjunction with article 42A.256 of the Code of Criminal Procedure.³

³Although you raise section 552.101 of the Government Code in conjunction with section 9 of article 42.12 of the Code Criminal Procedure, we note the 84th Legislature repealed this statute effective January 1, 2017. See Act of June 17, 2015, 84th Leg., R.S., ch. 770, §§ 3.01, 4.02, 2015 Tex. Gen. Laws 2320, 2395.

Section 552.101 of the Government Code also encompasses information made confidential by statute, such as the Medical Practice Act (“MPA”), subtitle B of title 3 of the Occupations Code, which governs release of medical records. Section 159.002 of the MPA provides, in relevant part:

(a) A communication between a physician and a patient, relative to or in connection with any professional services as a physician to the patient, is confidential and privileged and may not be disclosed except as provided by this chapter.

(b) A record of the identity, diagnosis, evaluation, or treatment of a patient by a physician that is created or maintained by a physician is confidential and privileged and may not be disclosed except as provided by this chapter.

(c) A person who receives information from a confidential communication or record as described by this chapter, other than a person listed in Section 159.004 who is acting on the patient’s behalf, may not disclose the information except to the extent that disclosure is consistent with the authorized purposes for which the information was first obtained.

Occ. Code § 159.002(a)-(c). Information subject to the MPA includes both medical records and information obtained from those medical records. *See id.* §§ 159.002, .004. This office has concluded the protection afforded by section 159.002 extends only to records created by either a physician or someone under the supervision of a physician. *See* Open Records Decision Nos. 487 (1987), 370 (1983), 343 (1982). Upon review, we find the information you have marked constitutes a record of the identity, diagnosis, evaluation, or treatment of a patient by a physician. Accordingly, the district attorney’s office must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the MPA.

Section 552.101 of the Government Code also encompasses section 411.083 of the Government Code, which pertains to criminal history record information (“CHRI”). CHRI generated by the National Crime Information Center (“NCIC”) or by the Texas Crime Information Center is confidential under federal and state law. CHRI means “information collected about a person by a criminal justice agency that consists of identifiable descriptions and notations of arrests, detentions, indictments, informations, and other formal criminal charges and their dispositions.” Gov’t Code § 411.082(2). Title 28, part 20 of the Code of Federal Regulations governs the release of CHRI obtained from the NCIC network or other states. *See* 28 C.F.R. § 20.21. The federal regulations allow each state to follow its individual law with respect to CHRI it generates. Open Records Decision No. 565 at 7 (1990); *see generally* Gov’t Code ch. 411 subch. F. Section 411.083 of the Government Code deems confidential CHRI the Texas Department of Public Safety (“DPS”) maintains, except DPS may disseminate this information as provided in chapter 411,

subchapter F, or subchapter E-1, of the Government Code. *See* Gov't Code § 411.083. Sections 411.083(b)(1) and 411.089(a) authorize a criminal justice agency to obtain CHRI; however, a criminal justice agency may not release CHRI except to another criminal justice agency for a criminal justice purpose. *Id.* § 411.089(b)(1). Thus, any CHRI obtained from DPS or any other criminal justice agency must be withheld under section 552.101 of the Government Code in conjunction with Government Code chapter 411. You assert section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code for the information you have marked. Upon review, we find the information we have marked consists of CHRI which the district attorney's office must withhold under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. However, we find you have failed to demonstrate the remaining information at issue consists of confidential CHRI. Therefore, the district attorney's office may not withhold any portion of the remaining information at issue under section 552.101 of the Government Code on this basis.

Section 552.101 of the Government Code also encompasses section 508.313 of the Government Code, which is applicable to records of the Texas Department of Criminal Justice ("TDCJ"). Section 508.313 provides, in part:

(a) All information obtained and maintained, including a victim protest letter or other correspondence, a victim impact statement, a list of inmates eligible for release on parole, and an arrest record of an inmate, is confidential and privileged if the information relates to:

(1) an inmate of the institutional division [of TDCJ] subject to release on parole, release to mandatory supervision, or executive clemency;

(2) a releasee; or

(3) a person directly identified in any proposed plan of release for an inmate.

...

(c) [TDCJ], on request or in the normal course of official business, shall provide information that is confidential and privileged under Subsection (a) to:

...

(4) an eligible entity requesting information for a law enforcement, prosecutorial, correctional, clemency, or treatment purpose.

(d) In this section, “eligible entity” means:

- (1) a government agency, including the office of a prosecuting attorney[.]

Id. § 508.313(a), (c)(4), (d)(1). Thus, TDCJ may provide information that is encompassed by section 508.313 to an eligible entity, and such information remains confidential in the possession of the entity to which it was provided. *See id.* § 508.313(c)-(d); *see also* Open Records Decision No. 655 at 8 (1997) (information excepted from public disclosure under Act may be transferred between governmental agencies without destroying its confidential character if agency to which information is transferred has authority to obtain it). Upon review, we find you have failed to demonstrate TDCJ provided the information at issue to the district attorney’s office under section 508.313(c). Accordingly, the information you have marked may not be withheld under section 552.101 of the Government Code in conjunction with section 508.313 of the Government Code.

Section 552.101 of the Government Code also encompasses sections 560.001, 560.002, and 560.003 of the Government Code. Section 560.003 of the Government Code provides, “[a] biometric identifier in the possession of a governmental body is exempt from disclosure under [the Act].” Gov’t Code § 560.003; *see id.* § 560.001(1) (“biometric identifier” means retina or iris scan, fingerprint, voiceprint, or record of hand or face geometry). Section 560.002 of the Government Code provides, however, “[a] governmental body that possesses a biometric identifier of an individual . . . may not sell, lease, or otherwise disclose the biometric identifier to another person unless . . . the individual consents to the disclosure[.]” *Id.* § 560.002(1)(A). In this instance, the remaining information contains the fingerprints of the requestor’s client. Thus, this requestor has a right of access to his client’s fingerprints under section 560.002(1)(A). Therefore, the district attorney’s office must release the requestor’s client’s fingerprints, which we have marked, to him pursuant to section 560.002 of the Government Code.

Section 552.108 of the Government Code states, in pertinent part, the following:

- (a) Information held by a law enforcement agency or prosecutor that deals with the detection, investigation, or prosecution of crime [is excepted from required public disclosure] if:

...

- (4) it is information that:

- (A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

(b) An internal record or notation of a law enforcement agency or prosecutor that is maintained for internal use in matters relating to law enforcement or prosecution [is excepted from required public disclosure] if:

...

(3) the internal record or notation:

(A) is prepared by an attorney representing the state in anticipation of or in the course of preparing for criminal litigation; or

(B) reflects the mental impressions or legal reasoning of an attorney representing the state.

Id. § 552.108(a)(4), (b)(3). A governmental body claiming an exception to disclosure under subsection 552.108(a)(4) or subsection 552.108(b)(3) must explain how and why this exception is applicable to the information at issue. *See id.* §§ 552.108, .301(e)(1)(A). You argue the information you have marked consists of internal notations or records prepared by an attorney representing the state or consists of the mental impressions or legal reasoning of an attorney representing the state. Based on your representations and our review, we agree subsection 552.108(a)(4) and subsection 552.108(b)(3) are applicable to the information at issue. Accordingly, the district attorney's office may withhold the information you have marked under subsection 552.108(a)(4) and subsection 552.108(b)(3) of the Government Code.

In summary, the district attorney's office must withhold the information you have marked under section 552.101 of the Government Code in conjunction with article 42A.256 of the Code of Criminal Procedure. The district attorney's office must withhold the information you have marked under section 552.101 of the Government Code in conjunction with the MPA. The district attorney's office must withhold the information we have marked under section 552.101 of the Government Code in conjunction with section 411.083 of the Government Code and federal law. The district attorney's office must release the requestor's client's fingerprints, which we have marked, to him pursuant to section 560.002 of the Government Code. The district attorney's office may withhold the information you have

marked under subsection 552.108(a)(4) and subsection 552.108(b)(3) of the Government Code. The district attorney's office must release the remaining information.⁴

This letter ruling is limited to the particular information at issue in this request and limited to the facts as presented to us; therefore, this ruling must not be relied upon as a previous determination regarding any other information or any other circumstances.

This ruling triggers important deadlines regarding the rights and responsibilities of the governmental body and of the requestor. For more information concerning those rights and responsibilities, please visit our website at http://www.texasattorneygeneral.gov/open/orl_ruling_info.shtml, or call the Office of the Attorney General's Open Government Hotline, toll free, at (877) 673-6839. Questions concerning the allowable charges for providing public information under the Act may be directed to the Office of the Attorney General, toll free, at (888) 672-6787.

Sincerely,

A handwritten signature in black ink, appearing to read 'Meredith L. Coffman', with a long horizontal line extending to the right.

Meredith L. Coffman
Assistant Attorney General
Open Records Division

MLC/tdw

Ref: ID# 668195

Enc. Submitted documents

c: Requestor
(w/o enclosures)

⁴We note the requestor has a right of access to some of the information being released. See Gov't Code § 552.023(a); Open Records Decision No. 481 at 4 (1987) (privacy theories not implicated when individuals request information concerning themselves). Thus, the district attorney's office must again seek a decision from this office if it receives another request for the same information from another requestor.